



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AN87

Tentative Eligibility Determinations; Presumptive Eligibility for Psychosis and Other Mental Illness

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) regulation authorizing tentative eligibility determinations to comply with amended statutory authority concerning minimum active-duty service requirements. This document also codifies in regulation statutory presumptions of medical care eligibility for veterans of certain wars and conflicts who developed psychosis within specified time periods and for Persian Gulf War veterans who developed a mental illness other than psychosis within 2 years after service and within 2 years after the end of the Persian Gulf War period.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; (202) 461-1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is revising 38 CFR 17.34(b) to allow for tentative eligibility determinations for persons who seek a tentative eligibility determination for VA health care based on a period of service that began after September 7, 1980 and meet the minimum service requirements in 38 U.S.C. 5303A, provided they have filed their application for VA health care within 6 months after the date of discharge under conditions other than dishonorable. We are also revising § 17.34(b) to remove the minimum active-duty period of 6 months for persons who seek a tentative eligibility determination based on a period of service that began on or before September 7, 1980.

We are also amending VA's regulation on the provision of care to non-enrolled veterans, 38 CFR 17.37, to include veterans with psychosis or mental illness other than psychosis. We are establishing a new § 17.109 that codifies for the first time in regulation the two presumptions of eligibility for medical care based on specific diagnoses in certain veteran populations, as set forth in 38 U.S.C. 1702(a). Finally, we are amending 38 CFR 17.108, 17.110, and 17.111 to clearly exempt from any copayment requirement persons eligible for care under proposed § 17.109.

VA proposed all of these amendments in a document published in the Federal Register on March 1, 2012 (77 FR 12522). We provided a 60-day comment period, which ended on April 30, 2012. We received seven comments from members of the general public.

One commenter requested clarification regarding the purpose of the regulation. The commenter suggested that VA intended the regulation to “put an end to ‘mental illness’ claims by Gulf War Vets.”

In response, we assure the commenter that this rulemaking does not prevent Gulf War veterans, or any veterans, from filing VA benefit claims. The rulemaking facilitates an eligible veteran’s ability to receive medical care for psychosis and mental illness other than psychosis. In the proposed rulemaking, we stated that “the Veterans Health Administration (VHA) may treat the covered disabilities as if they were service-connected for purposes of furnishing VHA benefits and, in turn, determine that no copayment is applicable to the receipt of such benefits.” By providing medical care to a veteran before VA determines that the veteran’s psychosis or mental illness other than psychosis is service-connected, VA is ensuring that the veteran receives immediate medical treatment for such condition, without waiting for a determination of service-connection. The immediate medical treatment will, in turn, enable the veteran to manage his or her medical condition more effectively.

The commenter also asked whether VA “want[s] to use this regulation just for medical decisions.” The answer is that we do intend to use this regulation solely for VA medical care eligibility determinations. Tentative eligibility determinations have no effect on a determination of actual eligibility for VA medical care or any other VA benefit. We

hope this explanation resolves the commenter's concerns, and we do not make any changes based on this comment.

Another commenter stated that the "entire rule should be [re]vised due to its ineffectiveness to service military personnel suffering from psychosis." The commenter went on to state that the proposed rule did not consider four factors enumerated by the commenter. The first factor is that "having a mental illness is like having a disability." The second factor is that "the six month rule is insane, no matter the time one serves this country should not be an issue." The third factor is that "[t]he manner in which a person was discharged should not be relevant." Lastly, the fourth factor provided by the commenter indicated that changes should start with addressing "the understaffed and unsanitary conditions of some of these facilities." We discuss each of these factors below.

Regarding the commenter's first factor, VA currently rates a veteran's mental illness in accordance with the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, of the American Psychiatric Association (DSM-IV), and we recognize mental illness as a disability that can serve as the basis for an award of service-connection. See 38 CFR 4.130. In fact, this final rulemaking enables VA to provide prompt treatment of a veteran's psychosis or mental illness other than psychosis without waiting for a finding of service-connection. Providing such treatment will not hinder the process of determining whether the psychosis or mental illness is service-connected for VA purposes. In the proposed rulemaking we made clear that, in many cases, the

condition for which the veteran seeks care is one for which service-connection will probably be established. The aim of this rulemaking is to make certain that veterans receive prompt treatment for psychosis or mental illness other than psychosis after discharge from service. We do not make any changes based on this comment.

The commenter's second concern is the requirement in § 17.34(b)(1) that a veteran who seeks eligibility based on service provided on or before September 7, 1980, must have served for a period of at least 6 months of active duty. Since its promulgation, VA's regulation governing tentative eligibility determinations included a 6-month minimum requirement. See 38 CFR 17.35 (1970). However, as explained in the proposed rule preamble, we proposed to amend § 17.34 to comply with the minimum service requirements contained in 38 U.S.C. 5303A, which apply to veterans who entered active duty after September 7, 1980. We now remove from § 17.34(b) the 6-month service requirement for veterans who seek eligibility for VA health care based on service provided on or before September 7, 1980, in consideration of the fact that very few, if any, veterans will be seeking tentative eligibility determinations within 6 months of discharge for a period of service that began over 32 years ago. The amount of time that a veteran, who entered active duty after September 7, 1980, must serve on active duty in order to be eligible for VA benefits is governed by 38 U.S.C. 5303A. Congress added a minimum active duty requirement due to concern that some servicemembers were, through inappropriate or unproductive conduct, bringing about their early discharges, and that some of them had enlisted for the purpose of obtaining eligibility for veterans' benefits based on short periods of service. Congress believed it was inappropriate to

provide veterans' benefits to those who substantially fail to fulfill their active-duty service commitments. See Senate Report 97-153, July 8, 1981; See also Public Law 96-342. In particular, we amend § 17.34(b) to state that tentative eligibility determinations for VA health care will be made if "[t]he application is filed within 6 months after date of discharge under conditions other than dishonorable, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. 5303A." For applications for which tentative eligibility cannot be granted, VA will honor its duty to assist veterans in obtaining necessary documentation of proof of service or other documentation necessary to validate eligibility.

Regarding the commenter's third factor, in reference to the "manner in which a person was discharged," the proposed rulemaking stated that the veteran must have received an honorable discharge to qualify for tentative eligibility for VA health care. The term "veteran" is defined in 38 U.S.C. 101(2) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." Before it was amended by this rulemaking, § 17.34(b) stated that tentative eligibility for VA health care may be authorized if "[t]he application was filed within 6 months after date of honorable discharge from a period of not less than 6 months of active duty." Proposed § 17.34(b) retained use of the term "honorable discharge;" however, we agree with the commenter that this may be too restrictive. For example, a general discharge under honorable conditions technically is not the same as an "honorable" discharge, but it is a discharge that is "other than

dishonorable.” To limit tentative eligibility to veterans with an “honorable discharge” would exclude some veterans with discharges that are not dishonorable and whose eligibility “probably will be established.” Therefore, to cover all veterans whose eligibility for VA health care probably will be established, we amend § 17.34(b) to state that the application for tentative eligibility for VA health care must be filed within 6 months after the date of discharge “under conditions other than dishonorable.” This amendment will also correctly reflect the requirement of the statutory definition of “veteran,” which, as previously stated in this rulemaking, requires that a person be discharged under conditions other than dishonorable. For applications for which tentative eligibility cannot be granted, VA will honor its duty to assist veterans in obtaining necessary documentation of proof of service or other documentation necessary to validate eligibility.

The commenter’s last factor concerning “the understaffed and unsanitary conditions of some of these facilities” is beyond the scope of this rulemaking. We do not make any changes based on this comment.

Another commenter suggested that the “presumptive service be given for all veterans to whichever is later, the proposed changes or this . . . within two years of separation from active duty.” The commenter cited as an example that “if the presumptive service-connection was afforded two years after the veteran retired it would give the veteran time to come forward with their mental health issues after they have

separated which is more likely the time they would report their symptoms.” The purpose and meaning of this comment is unclear.

We believe that the commenter’s concern was that the tentative eligibility determination under § 17.34 should apply if a veteran submits an application within 2 years after discharge. The 6-month limitation for tentative eligibility determinations for VA health care is to afford medical assistance to veterans immediately after discharge but before they have had sufficient time to file a claim to establish eligibility as is generally required. If the veteran’s psychosis is not manifested immediately after discharge, but develops within 2 years after discharge from active duty, the veteran may be eligible for treatment under new § 17.109, which codifies the statutory presumptions of eligibility established by Congress at 38 U.S.C. 1702. The 2-year time period to be eligible to receive medical care under 38 U.S.C. 1702 recognizes that psychosis may take some time to fully manifest itself. We do not make any changes based on this comment.

A commenter supported the rulemaking and believes that it “will bring about needed changes to [the] VA healthcare system.” The commenter also stated that “I do, however, like that there is no minimum service requirement for length of active-duty in order to qualify for these benefits.” The commenter’s statement regarding no minimum active duty service requirement to qualify for benefits is correct as it applies to § 17.109. However, as previously stated in this final rulemaking, 38 U.S.C. 5303A establishes a

minimum active duty period for tentative eligibility determinations, as stated in § 17.34(b).

This same commenter, along with a second commenter, was concerned with the 2-year time limit in § 17.109 for the development of psychosis following discharge to establish a presumptive eligibility. The first commenter stated that the “patients would have needed to develop psychosis within 2 years of discharge or after the war/conflict. My problem with this provision is that illnesses that stem from a traumatic event, such as psychosis, can develop later in life.” This first commenter further stated that psychosis does not follow a calendar. The second commenter stated that “[d]espite all the advances in diagnosing and treating mental illnesses, the field is still not precise in diagnosis.” This second commenter further stated that the diagnosis of a mental condition can be subjective, because “there isn’t always objective empirical evidence.” Both commenters concluded that, to address their concerns, VA should extend the 2-year time limit. However, Congress established the 2-year period at 38 U.S.C. 1702. As previously noted, VA cannot amend a statutory period through regulation. Therefore, we do not make any changes based on these comments.

Another commenter stated that VA needs to “house and care for basic human conditions, including comprehensive medical and psychiatric care.” The commenter suggested that this care could be accomplished with comprehensive advanced registered nurse practitioners who work “in the community where these veterans live.” We appreciate the commenter taking the time to comment on the rulemaking, however,

we believe that the specific mechanisms for providing care to veterans who are in need of medical and psychiatric care are beyond the scope of this rulemaking. We do not make any changes based on this comment.

Finally, one commenter observed an increasing need for mental health care for veterans. The commenter stated that, although the “proposed rule would not solve the critical issue of veterans['] timely access to mental health care, it is at least a step in the right direction,” and “might simplify the process for soldiers applying for mental health benefits and care.” This rulemaking, in conjunction with other VA outreach and health care services, provides VA with the flexibility to provide care aimed at improving the mental health of veterans. The rulemaking also allows for the prompt treatment of psychosis and other mental conditions immediately after a qualifying veteran is discharged from service. We agree with the commenter in that this rulemaking is a step in the right direction for the betterment of a veteran’s mental health. We do not make any changes based on this comment.

Based on the rationale set forth in the Supplementary Information to the proposed rule and in this final rule, VA is adopting the proposed rule as a final rule with the change mentioned above.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA’s implementation of its legal authority on this subject. Other than future

amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory

Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for

inflation) in any given year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for the programs affected by this document are: 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.013, Veterans Prosthetic Appliances; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on May 3, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of General Counsel,
Department of Veterans Affairs.

For the reasons stated in this rulemaking, the Department of Veterans Affairs amends 38 CFR part 17 as set forth below:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.34 by revising paragraph (b) and adding an authority citation to read as follows:

§ 17.34 Tentative eligibility determinations.

* * * * *

(b) Based on discharge. The application is filed within 6 months after date of discharge under conditions other than dishonorable, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. 5303A.

(Authority: 38 U.S.C. 501, 5303A)

3. Amend § 17.37 by adding paragraph (k) to read as follows:

§ 17.37 Enrollment not required—provision of hospital and outpatient care to veterans.

* * * * *

(k) A veteran may receive care for psychosis or mental illness other than psychosis pursuant to 38 CFR 17.109.

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4. Amend § 17.108 by adding paragraph (d)(12) to read as follows:

§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

* * * * *

(d) * * *

(12) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

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5. Add § 17.109 to read as follows:

§ 17.109 Presumptive eligibility for psychosis and mental illness other than psychosis.

(a) Psychosis. Eligibility for benefits under this part is established by this section for treatment of an active psychosis, and such condition is exempted from copayments under §§ 17.108, 17.110, and 17.111 for any veteran of World War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed such psychosis:

(1) Within 2 years after discharge or release from the active military, naval, or air service; and

(2) Before the following date associated with the war or conflict in which he or she served:

(i) World War II: July 26, 1949.

(ii) Korean conflict: February 1, 1957.

(iii) Vietnam era: May 8, 1977.

(iv) Persian Gulf War: The end of the 2-year period beginning on the last day of the Persian Gulf War.

(b) Mental illness (other than psychosis). Eligibility under this part is established by this section for treatment of an active mental illness (other than psychosis), and such condition is exempted from copayments under §§ 17.108, 17.110, and 17.111 for any veteran of the Persian Gulf War who developed such mental illness other than psychosis:

(1) Within 2 years after discharge or release from the active military, naval, or air service; and

(2) Before the end of the 2-year period beginning on the last day of the Persian Gulf War.

(c) No minimum service required. Eligibility for care and waiver of copayments will be established under this section without regard to the veteran's length of active-duty service.

(Authority: 38 U.S.C. 501, 1702, 5303A)

6. Amend § 17.110 by adding paragraph (c)(10) to read as follows:

§ 17.110 Copayments for medication.

* * * * *

(c) * * *

(10) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

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7. Amend § 17.111 by adding paragraph (f)(9) to read as follows:

§ 17.111 Copayments for extended care services.

* * * * *

(f) * * *

(9) A veteran receiving care for psychosis or a mental illness other than psychosis pursuant to § 17.109.

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